

HONORABLE BARBARA J. ROTHSTEIN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

KIT LEE, an individual

Plaintiff,

v.

BERKSHIRE HATHAWAY GUARD
INSURANCE COMPANIES, a foreign
insurance corporation, AMGUARD
INSURANCE COMPANY, a foreign insurance
corporation,

Defendant

NO. 2:20-CV-1634 BJR

**AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT, BREACH
OF CONTRACT, BAD FAITH, VIOLATION
OF THE CONSUMER PROTECTION ACT,
AND VIOLATION OF THE INSURANCE
FAIR CLAIMS ACT**

Plaintiff, Kit Lee, states his Amended Complaint as follows:

I. NATURE OF THIS ACTION

1. This is a lawsuit for Declaratory Judgment pursuant to 28 U.S.C. § 2201 to obtain a judicial declaration as to Defendants' obligation to provide insurance coverage for Plaintiff in

AMENDED COMPLAINT -1

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1 connection with fire damage to Plaintiff's apartment building located at 2539 13th Ave. S,
2 Seattle, WA 98144, located in King County Washington (the "Property"); to recover policy
3 benefits and damages attending Defendants' breach of the insurance contract; and to recover
4 damages for Defendants' bad faith claims handling practices, violations of the Consumer
5 Protection Act, and violations of the Insurance Fair Claims Act.

6 7 **II. PARTIES, JURISDICTION AND VENUE**

8 2.1 This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332 (diversity)
9 and 28 U.S.C. § 2201 (declaratory judgments). This is a civil action between citizens of different
10 states, with an amount in controversy exceeding \$75,000, exclusive of interest and costs.

11 2.2 Plaintiff is a Washington resident, a named insured and loss payee under a
12 Business Owner's Insurance Policy No. KIBP099215 (the "Policy"), the owner of the insured
13 Property at-issue in this lawsuit, and the owner of the Claim (as defined in the Policy) resulting
14 from the destruction of the Property at issue in this lawsuit.

15 2.3 Defendant Berkshire Hathaway Guard Insurance Companies is, on information
16 and belief, a corporation organized under the laws of a state other than Washington State,
17 domiciled in Pennsylvania, and doing business in Washington State.

18 2.4 Defendant AmGuard Insurance Company is, on information and belief, a wholly
19 owned subsidiary of Defendant Berkshire Hathaway Guard Insurance Companies, and is a
20 corporation organized under the laws of a state other than Washington State, domiciled in
21 Pennsylvania, and doing business in Washington State.

22 2.5 Defendants insured the Property and Plaintiff.

23 2.6 Venue is appropriate as at all material times Defendants were doing business in
24 the Western District of Washington, the facts giving rise to this lawsuit occurred in the Western
25 District of Washington, and the at-issue insurance policy was sold in the Western District of
26 Washington.

III. RELEVANT FACTS

A. The Insurance Contract.

3.1 Plaintiff purchased the Policy from Defendants. The Policy is a Commercial/Business Owner's insurance policy covering against all risks of physical loss of, or damage, to the Property, except as expressly excluded. There are no applicable exclusions.

3.2 The Policy provided coverage for the period October 30, 2019 to October 30, 2020.

3.3 The Policy provides, in relevant part, at least \$973,000 limits for the building, at least \$10,000 for debris removal, and Actual Loss Sustained up to 12 months for Business Income and Extra Expense losses.

B. The Loss Event.

3.4 On November 7, 2019, a fire occurred at the Property, causing extensive damage to five rental units, stairwells, a sprinkler room and the parking garage. More than half of the building tenants had to be relocated due to the fire damage.

3.5 On November 7, 2019, immediately on learning about the fire, Plaintiff notified Defendants of the fire and attendant loss. Defendants provided a claim number and told Plaintiff find a solution to the immediate problem to mitigate damages. Plaintiff hired Servpro to commence the mitigation work. Shortly thereafter, Defendants retained Engle Martin & Associates ("EMA"), a Seattle based General Adjuster, to act as their on-scene loss adjusters.

3.6 On November 27, 2019, Plaintiff asked EMA: "Do I submit all claims to you? Or claim at BH Guard? How Do I claim rent loss? Please advise. Thanks." EMA responded: "Yes, please forward all costs, invoices, loss of rent information and everything else pertaining to the claim to me. I will then submit the entire claim to the insurance company in a report form for which they are accustomed, to streamline the entire process."

1 **C. Claims Handling.**

2 **1. Remediation.**

3 3.7 On November 13, 2019, EMA met with Servpro on scene. Servpro was
 4 performing the mitigation work at the time. EMA and Servpro agreed on a scope of work for
 5 remediation to be billed to Defendants on a Time and Materials (“T&M”) basis. With
 6 Defendants’ approval, and with assurance that their bill would be paid by Defendants, Plaintiff
 7 undertook the remediation work. Servpro provided EMA with regular update summaries of the
 8 work being performed, each time confirming the work was being done on a T&M basis. After
 9 having approved the contract, Defendants never raised any objection to the work being
 10 performed on a T&M basis.

11 3.8 On December 16, 2019, Servpro completed the remediation work. On January 8,
 12 2020, Servpro provided EMA with an invoice in the amount of \$131,895.46 for the remediation
 13 work. Servpro followed up with EMA many times over the next two months trying to get paid
 14 for the completed work. They provided EMA with at least two lien notifications.

15 3.9 On February 7, 2020, Servpro wrote to EMA:

16
 17 Servpro has tried numerous times to reach you via email and by phone with no return
 18 response. We are approaching our lien date and would like to resolve the issue
 19 regarding payment for mitigation services. The insured is also eager to begin
 20 reconstruction services, but this has been on hold due to lack of communication from
 21 Guard. Please reply all with an update or contact our office.

22 EMA did not respond.

23 3.10 On March 19, 2020, Servpro filed a lien against the Property for the \$131,895.46
 24 remediation invoice, plus fees and interest. Servpro’s attorneys, Cairncross & Hempelmann,
 25 wrote to Defendants on March 23, 2020 advising them of the lien and asking that the
 26 outstanding invoice be paid. Defendants never responded.

1 3.11 Plaintiff and Servpro each wrote to EMA and Defendants many times between
2 March 2020 and July 2020 asking what Defendants were doing with the remediation invoice.
3 There was no way Servpro was going to enter into a contract for the repair/reconstruction work
4 without being paid for the remediation work, and Plaintiff wanted the lien released. Finally, on
5 July 29, 2020, Defendants sent Plaintiff \$72,581.17 for the mitigation work—less than one half
6 Servpro's invoice amount. Defendants' explanation for the underpayment, stated for the first
7 time, was that they do not work with T&M estimates.
8

9 3.12 Not knowing what he was supposed to do with the partial payment, Plaintiff
10 wrote to Defendants asking, "What should I do from here?" On August 6, 2020, Defendants
11 wrote back to Plaintiff saying they were trying to work with Servpro but Servpro was not
12 cooperating. This was not true.
13

14 3.13 On August 7, 2020, Servpro's attorneys wrote to Defendants asking if they
15 needed anything further in order to make full payment of the remediation invoice. Defendants
16 never responded.
17

18 3.14 Defendants have refused to pay the balance owed on the remediation invoice
19 which has now grown to more than \$150,000 with accruing fees and interest. The unsatisfied
20 lien remains on Plaintiff's property to this day. On November 12, 2020, Servpro filed suit
21 against Plaintiff in Superior Court in King County, Washington. That lawsuit was tendered to
22 Defendants on November 18, 2020. Defendants have not accepted the tender or provided
23 defense counsel, so Plaintiff has retained counsel and filed a Notice of Appearance in that
24 matter.
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1 **2. Reconstruction.**

2 3.15 Defendants knew that as soon as the remediation work was completed,
3 reconstruction work would need to commence with urgency. The loss of rental income coverage
4 under the Policy is limited to the actual loss sustained **up to 12 months**, which means the
5 damaged rental units had to be repaired and available to rent no later than November 7, 2020
6 unless Defendants would extend the coverage period.

7 3.16 On November 27, 2019, Servpro provided EMA with a reconstruction estimate in
8 the amount of \$145,216.09. EMA responded in mid-December advising the Defendants had
9 obtained another reconstruction estimate from American Technologies Inc. (“ATI”) for
10 \$240,005.46. Plaintiff relied on Defendants to select the contractor, and to arrange for
11 payment of the associated costs. Defendants never approved or hired any contractor to
12 commence the repair work.

13 3.17 On March 10, 2020, Defendants advanced \$45,000 to Plaintiff with the cryptic
14 comment: “Building Repairs Advance”. With no contractor having been hired, Plaintiff had no
15 idea what he was supposed to do with the money.

16 3.18 On April 22, 2020, Plaintiff wrote to Defendants advising:

17 My lost rents are more than \$35,000 now, I am a retired person, and the rental income
18 is my main source of income. Please speed up the process so I can start reconstruction
19 and put property back on rental market.

20 Defendants responded on April 24, 2020, apologizing for the delay and telling Plaintiff they
21 were working on the loss adjustment.

22 3.19 Between April 24, 2020 and June 29, 2020, Plaintiff wrote to Defendants at least
23 four times asking what was happening on the claim—the remediation payment, the repair work
24 and the lost rental income claim. On June 29, 2020 he wrote: “What is new on my claim? It has
25 been 7 months and I really need to start construction.”
26

1 3.20 On July 2, 2020, Defendants wrote to Plaintiff reminding him they had issued a
2 check in the amount of \$45,000 to start reconstruction and advised that they were reviewing
3 the repair/reconstruction estimates—presumably referring to those provided by Servpro and
4 ATI. Plaintiff still had no idea what he was supposed to do with the \$45,000, so he wrote again
5 to Defendants asking for an update on his claim and for guidance.
6

7 3.21 On July 29, 2020, Defendants sent another check to Plaintiff, this time for
8 \$127,256.63. Defendants provided the following cryptic description of what the money was
9 for: “\$110,264.51 RCV building repairs, \$72,581.17 RCV mitigation; less \$9,589.05 depreciation,
10 \$1,000 deductible, \$45,000 advance.” At this time, Defendants had paid \$155, 264.51 towards
11 the cost of reconstruction. This was nearly \$100,000 less than what ATI had bid to do the work
12 and while it was enough to have covered Servpro’s initial estimate, Servpro was not going to
13 enter into a contract to do any further work until they were paid for the remediation work.
14

15 3.22 On August 3, 2020, Plaintiff wrote to Defendants to let them know he received
16 the checks: “Received your overnight check. The approved amounts are short from actual
17 billing and reconstruction estimates. What should I do from here?” On August 6, 2020,
18 Defendants wrote back to Plaintiff saying they were trying to work with Servpro but Servpro was
19 not cooperating. This was not true.
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21 3.23 Defendants have never hired a contractor to undertake the reconstruction work
22 and no reconstruction has commenced.
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1 **3. Lost rental income**

2 3.24 In the fire, five rental units were destroyed: units #101, 102, 201, 202 and 301.
3 Plaintiff made a claim for loss of rents for all five units, and with the claim provided a copy of
4 the five lease agreements.

5 3.25 On November 15, 2019, Defendants wrote to Plaintiff advising they had not
6 received a copy of the lease for unit 301. Plaintiff advised he had sent it. Shortly thereafter
7 Defendants apologized and acknowledged they had received a copy. Then on November 30,
8 2019, EMA advised they had been provided leases for only units 101, 102, 201 and 202, and
9 they requested rent rolls and the Profit and Loss Statement from 2018. Plaintiff provided another
10 copy of the lease for unit 301 and the other requested documentation.

11 3.26 On January 29, 2020, Plaintiff wrote to EMA: "I haven't heard anything from Bill
12 at the insurance company, left few messages in the past week. No reply yet. Really need some
13 response from you or them. Thanks." EMA responded the same day: "Still no check? Have
14 repairs begun?"

15 3.27 Between January 29, 2020 and July 24, 2020, Plaintiff wrote to Defendants
16 and/or EMA no less than ten times asking for an update on his claim. Finally, on July 27, 2020,
17 Defendants wrote to advise they had just retained an accounting expert, TD Davidson, "to deal
18 with the rent loss calculation." On that day, Defendants provided TD Davidson with a copy of
19 all the rent loss reports, documents and leases.
20

21 3.28 On August 7, 2020, TD Davidson wrote to Plaintiff asking for current leases on
22 some units, for bank records in excel, and other financial records. Plaintiff promptly provided
23 the requested information.
24
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1 3.29 On August 21, 2020, Plaintiff wrote to TD Davidson:

2 How is the progress of my claim? I filed the claim almost 10 months ago with a very
3 slow process. I am a retired person, rental income is the main source of my income. I
4 have been suffering with great financial hardship the past ten months. Needless to say,
 please kindly process my claim asap. Thank you.

5 3.30 On September 8, 2020, Plaintiff wrote to TD Davidson: "Any progress on this."

6 TD Davidson responded that they were preparing an analysis to send to the insurer.

7 3.31 On September 10, 2020, Plaintiff wrote to TD Davidson to express his concern
8 that his lost rental income claim might be barred by the 12 month limitation in the Policy
9 because with no reconstruction contract in place there was no way the Property was going to
10 be repaired and rentable within that 12 month period. He wrote: "I don't know how it works."
11 TD Davidson responded: "Can you please send the 2019 Tax Return, and how many units were
12 not damaged and what is their rent on a monthly basis." Other than the 2019 tax return, this
13 was all information that Plaintiff had previously provided, more than once, to Defendants.
14

15 3.32 On September 17 and 18, 2020, Plaintiff wrote to TD Davidson asking about the
16 status of the adjustment of his claim. He asked: "Please let me know what do I need to do next
17 to extend coverage so the 12 month limit on lost rents does not bar the claim." No one
18 responded.
19

20 3.33 As of November 7, 2020, Plaintiff's lost rents total at least \$89,100. Defendants
21 have refused to conclude its loss adjustment and has not paid one cent towards that claim.
22

23 3.34 Between November 7, 2019 and October 1, 2020, Plaintiff sent more than a
24 dozen emails to Defendants and their agents asking for an update on all elements of his claim.
25 Plaintiff repeatedly told Defendants that the delay in the loss adjustment effort and the failure to
26

1 pay was crushing him financially and emotionally. Over and over again Plaintiff asked
2 Defendants for help because he did not understand the process and did not know what to do.
3 Many of his pleas for help and direction were ignored.
4

5 3.35 Finally, Plaintiff was compelled to hire counsel. On October 2, 2020, Plaintiff's
6 counsel wrote to Defendants:

7 Mr. Lee, Guard's insured, has been nearly ruined by the manner in which you have
8 conducted (failed to conduct) your loss investigation and adjustment of this matter. The
9 loss adjustment has not been concluded. The loss has not been paid. Servpro is not paid
10 and is threatening a lawsuit and foreclosure. The building has not been repaired. And to
11 our knowledge no one from Guard has done anything with the loss of rents claim. We
12 are hard pressed to see how Guard and its agents have acted in good faith in any respect
13 in this matter, but we invite you to show us otherwise.

14 Please provide us a copy of all correspondence that has issued between Guard and anyone
15 in this matter. This includes, but is not limited to, your correspondence with Servpro,
16 Servpro's lawyers, and Mr. Lee. We need this information immediately so that we can
17 understand fully what Guard has done and not done on this matter.

18 Defendants did not respond.

19 3.36 On October 6, 2020, Plaintiff's counsel wrote to Defendants again: "We cannot
20 overstate the urgency of this matter. We anticipated a quick response to our October 2, 2020
21 letter. Please respond and provide the requested information." Defendants did not respond.

22 3.37 Defendants have violated RCW 48.30.015 by repeatedly and continuously
23 violating the provisions of Washington Administrative Code 284-30-33, 350, 360, 370 and 380,
24 all as more fully described above.

25 3.38 On October 12, 2020, in compliance with RCW 48.30.015 (8)(a), Plaintiff
26 provided both Berkshire Hathaway Guard Insurance Companies and the Office of the Insurance
Commissioner the required twenty day notice of Plaintiff's intent to file this lawsuit and assert a

1 claim for treble damages and other appropriate damages including, but not limited to, fees and
 2 costs, pursuant to RCW 48.30.015 (2) and (3). On November 12, 2020, out of an abundance of
 3 caution, Plaintiff provided a second notice of his intention to file this lawsuit, this time sending
 4 the notice to Defendant AmGUARD Insurance Company and the Office of the Insurance
 5 Commissioner. Defendants have made no effort to conclude the loss adjustment and either pay
 6 or settle this matter and the twenty days-notice provided to both Defendants has elapsed.

8 **IV. FIRST CAUSE OF ACTION—DECLARATORY JUDGMENT (28 U.S.C. §**
 9 **2201) RE: COVERAGE**

10 4.1 The foregoing paragraphs are re-alleged.

11 4.2 There is a genuine and bona fide dispute between Plaintiff and Defendants
 12 concerning whether the Policy provides coverage in connection with the property damage and
 13 resulting claims.

14 4.3 Pursuant to the Uniform Declaratory Judgment Act, 28 U.S.C. § 2201, et seq.
 15 Plaintiff requests that the Court declare that the Policy provides coverage for Plaintiff's claims.
 16

17 4.4 A declaratory judgment action is appropriate to determine coverage under an
 18 insurance policy in cases such as this where a dispute exists as to coverage.

19 **V. SECOND CAUSE OF ACTION—BREACH OF COVERAGE**

20 5.1 The foregoing paragraphs are re-alleged.

21 5.2 Defendants have a contractual duty to Plaintiff to provide coverage for his
 22 property, rental income and other losses and to act reasonably and in good faith in the
 23 investigation and adjustment of his claim. Defendants' handling of the claim, delay in and
 24 failure to make a coverage determination, and refusal to pay the fair value of the claims as
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 26

required by the Policy, breaches Defendants' contractual duties. Plaintiff complied with all applicable conditions precedent under the Policy which were not waived by Defendants.

5.3 As a direct and proximate result of Defendants' breach of the insurance contract, Plaintiff has suffered damages, and continues to suffer damages, in an amount to be proven at trial.

5.4 Plaintiff is also entitled to recover attorney's fees and costs as provided under *Olympic Steamship Company, Inc. v. Centennial Insurance Company*, 117 Wn.2d 37, 84 P.2d 673 (1991).

VI. THIRD CAUSE OF ACTION—BAD FAITH CLAIMS HANDLING

6.1 The foregoing paragraphs are re-alleged.

6.2 Defendants' handling of Plaintiff's insurance claim, as described in this Complaint, constitutes the tort of bad faith. As a direct and proximate result of Defendants' bad faith, Plaintiff has suffered damages in an amount to be proven at trial.

VII. FOURTH CAUSE OF ACTION—CONSUMER PROTECTION ACT VIOLATIONS

7.1 The foregoing paragraphs are re-alleged.

7.2 Defendants' actions, as described in this Complaint, constitute a violation of Washington's Consumer Protection Act, RCW 19.86 et seq. As a direct and proximate result of Defendants' violations of RCW 19.86, Plaintiff has suffered damages in an amount to be proven at trial, including, but not limited to, fees, costs, and statutory exemplary damages.

VIII. FIFTH CAUSE OF ACTION—VIOLATION OF RCW 48.30.015

8.1 The foregoing paragraphs are re-alleged.

8.2 Defendants have violated RCW 48.30.015 by repeatedly and continuously violating the provisions of Washington Administration Code 284-30, including but not limited to

1 paragraphs 330, 350, 360, 370 and 380. As a direct and proximate result of Defendants'
2 violations of RCW 48.30.015, Plaintiff has suffered damages in an amount to be proven at trial,
3 including but not limited to, treble damages, fees and costs.

4
5 **IX. RESERVATION OF RIGHTS**

6 9.1 The foregoing paragraphs are re-alleged.

7 9.2 Plaintiff reserves the right to amend this Complaint to allege any additional Policy
8 provisions or claims which may be relevant to this matter.

9 **X. PRAYER FOR RELIEF**

10 Plaintiff requests that the Court enter judgment against Defendants as follows:

11 10.1 An order declaring all of the relative rights and responsibilities of the parties
12 under the Policy at issue herein pursuant to 28 U.S.C. § 2201.

13 10.2 An order declaring Defendants breached the insurance contract.

14 10.3 An award of all damages proximately caused by Defendants' breach of contract
15 and bad faith.

16 10.4 An award of all allowable attorney fees and costs, including those incurred by
17 Plaintiff for being forced to sue to obtain the benefits of the insurance contract.

18 10.5 An award of exemplary damages to the extent available under the Consumer
19 Protection Act, RCW 19.86 et seq., and any other applicable law.

20 10.6 An award of treble damages, fees and costs pursuant to RCW 48.30.015.

21 10.7 An award of pre and post-judgment interest.

22 10.8 Plaintiff requests such other and further relief, whether legal or equitable, as this
23 Court deems just and proper.
24
25
26

/s/ John E.D. Powell

Attorneys for Plaintiff